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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

v.

RICHARD T. FORD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the United States participates in the Agreement on Detainers as a receiving and sending "state."

2. Whether, where the Government has actually filed a detainer, a writ of habeas corpus *ad prosequendum* subsequently issued for production of a state prisoner

constitutes a request for temporary custody under Article IV of the Agreement.

3. Whether the court below properly found that, on the facts of this case, respondent did not waive his claim under Article IV(c) of the Agreement on Detainers.

STATEMENT OF THE CASE

On October 11, 1973, respondent Richard T. Ford was arrested by the FBI in Chicago, Illinois, on warrants charging him with bank robbery and interstate flight to avoid confinement. The interstate flight warrant was dismissed but respondent was held by Chicago authorities for extradition to Massachusetts to face pending state charges of escape and assault (A. 74, 106-111). While incarcerated in Chicago, respondent submitted a letter to the United States Attorney for the Southern District of New York and to the United States District Court for the Southern District of New York in which he requested a prompt trial on the federal charges (A. 87-90). Before receiving a response, respondent was extradited to Massachusetts to stand trial on the state charges, and the federal warrant issued by the Southern District of New York charging him with bank robbery was lodged as a detainer in Massachusetts. On February 8, 1974, respondent pleaded guilty to the Massachusetts charges and was sentenced to concurrent terms of eight to ten years' imprisonment (A. 51, 74).

On March 21, 1974, a two-count indictment charging respondent with bank robbery was filed in the Southern

District of New York, and on March 25, a writ of habeas corpus *ad prosequendum* was issued to obtain custody of respondent for arraignment and until he was "discharged or convicted and sentenced on said indictment" (A. 1, 8). On April 1, 1974, respondent was arraigned, and that same day the Government filed a notice of readiness (A. 1, 12). Two days later, a superseding indictment was filed, charging respondent and one James P. Flynn with bank robbery and other crimes (A. 14-17). On April 15, 1974, respondent pleaded not guilty to the indictment. When Flynn failed to appear, a warrant was issued (A. 28-29).

During proceedings held on April 25, 1974, the court set May 28, 1974, as the date for commencement of trial. The Government requested that the trial not begin until that date so that it could locate co-defendant Flynn. While the court stated that the delay of one month was permissible since respondent was serving another sentence, it indicated its willingness to proceed with a severed trial of respondent on May 28th if the co-defendant were not found (A. 45-46).

On May 17, 1974, the Government requested the first of what was to become a long series of delays, moving to adjourn the trial for 90 days or until the co-defendant was apprehended, whichever came first, and supporting its request by a sealed affidavit (A. 48, 62).[1] Defense counsel objected to the de[illegible]reminded the court that respondent had requested [illegible]edy trial immediately after his arrest, and emphasized that [illegible]

[1] The co-defendant remained a fugitive, and was not located until long after respondent's trial.

federal detainer lodged against respondent in Massachusetts was imparing his eligibility for furlough and work release programs (A. 62-65).[2] Nevertheless, the Government's motion was granted, and a new trial date was set for August 21, 1974. On June 14, 1974, respondent was removed from federal custody and transferred back to Massachusetts (A. 65, 11).

In August, 1974, the case was reassigned from Judge Arnold Bauman to Judge Constance Baker Motley, following Judge Bauman's resignation from the bench. Almost immediately thereafter, without notice or explanation to the defense, the court postponed the trial date until November 18, 1974. The defense, which learned of the delay on or about August 16, 1974, subsequently noted its objection (A. 76, 85).

On November 1, 1974, the Government moved for yet another 90-day adjournment within which to apprehend the co-defendant, and again supported its motion by sealed affidavit (A. 71). In response, defense counsel moved to dismiss the indictment on the ground that respondent had been denied a speedy trial (A. 83). Again, respondent alleged that he was being prejudiced by denial of furlough privileges due to the federal detainer (A. 86). The court denied the defense motion and granted the Government its requested adjournment (A. 82, 91).

On the newly scheduled trial date, however, the district judge found herself engaged in a stock fraud trial and, over defense objection, postponed the trial until June 11, 1975 (A. 92-94), in apparent disregard of the Second Circuit's then-recent admonition that

[2] Argument on the motion was held on May 22, 1974 (A. 61).

calendar delay was no excuse for postponing a criminal trial and that in such cases the action should be assigned to a different judge [*United States v. Drummond*, 511 F.2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975)]. In the following month, the Southern District announced a crash program for civil cases. When the prosecutor inquired whether this would affect the date of respondent's trial, the district judge, without notice to defense counsel, set a new trial date. Once again, after learning of the delay, the defense objected (A. 96, 102; Pet. App. 4a).

On August 8, 1975, the Government obtained a second writ of habeas corpus *ad prosequendum* (A. 98-99). The trial began on September 2, 1975. That day, respondent again moved to dismiss for failure to provide a speedy trial, and again called attention to the prejudice caused him in Massachusetts by the pending federal charges (A. 105). The motion was denied, and respondent was subsequently convicted of all counts. The district judge sentenced respondent to concurrent five year terms, with the recommendation that the terms be allowed to run concurrently with the Massachusetts state sentence respondent was already serving (A. 114).[3]

[3] On August 13, 1977, respondent was released on parole on his state sentence. The preceding day, he was released from federal custody on his own recognizance pending the disposition of this case after having served some 20 months of the sentence concurrently with the Massachusetts sentence. The motion and order granting release were certified as Supplemental Index "D", Doc. Nos. 41-43, to the record in the court of appeals.

On appeal, respondent argued that the delay in bringing him to trial violated the Southern District Plan for Prompt Disposition of Criminal Cases, the Sixth Amendment, and Articles IV(c) and IV(e) (the speedy trial and transfer provisions) of the Interstate Agreement on Detainers. On February 3, 1977, the court of appeals reversed. Without reaching respondent's Sixth Amendment or speedy trial rule claims, the court of appeals found a violation of Article IV(c) of the Interstate Agreement on Detainers, which mandates that trial be commenced within 120 days of receipt of the prisoner unless continuances are granted for good cause in open court, and accordingly ordered dismissal of the indictment (Pet. App. 1a-26a).

After a review of the history and purposes underlying the enactment of the Interstate Agreement on Detainers, aptly characterized by the dissenting judge as a "most learned and exhaustive treatise" (Pet. App. 26a), the court concluded that where the federal government has actually filed a detainer against a state prisoner, it invokes Article IV of the Interstate Agreement on Detainers when it produces the prisoner for trial by means of a writ of habeas corpus *ad prosequendum.* The court noted that to hold otherwise would vitiate operation of the Agreement "insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (Pet. App. 20a). Writing for the majority, Judge Mansfield carefully distinguished this case from the circuit's then-recent opinion of *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert.*

granted, Sup. Ct. No. 76-1596, October 3, 1977, which held the sanctions of the Agreement applicable where no detainer was filed but where "the sole federal intervention is the issuance of a habeas writ," a decision from which Judge Mansfield had dissented (Pet. App. 19a).

After concluding that the Agreement applied, the court first rejected respondent Ford's claim that his transfer back to Massachusetts prior to trial violated Article IV(e) of the Agreement, which mandates that a defendant be tried before being returned to his original jurisdiction, holding that respondent had requested to be returned to Massachusetts and that such request waived his olaim under Article IV(e). Turning to Article IV(c), which requires that trial be held within 120 days, except for reasonable continuances granted in open court, the panel found that respondent had not waived this claim, that quite the contrary, he had repeatedly insisted upon a prompt trial. Finding that a number of the continuances were unjustifiable, in addition to having been granted outside respondent's presence, the court ordered dismissal of the indictment (Pet. App. 21a-26a). In dissent, Judge Moore took no issue with the majority's determination that the Agreement on Detainers applied, but disagreed with the majority's conclusion that the continuances were unnecessary and unreasonable (Pet. App. 26a-29a).

SUMMARY OF ARGUMENT

I. Despite the clear language of the Interstate Agreement on Detainers Act, which states that the Agreement applies in full to all participants, the Government maintains that Congress intended to exclude the federal government from participation when it obtains state prisoners for trial in federal courts or when prisoners in party states to the Agreement attempt to seek disposition of federal detainers. There is no valid basis for such an assertion.

First, under Article II of the Agreement, the federal government is defined without limitation as a "State." Second, Article VIII provides that the Agreement shall enter "into full force and effect" as to any State which enacts it into law. Third, Section 4 of the Act states that federal courts are "appropriate courts" for disposition of charges under the Agreement, which disposition can only be accomplished by courts of a "receiving state."

Apart from the unambiguous statutory language, the Act's legislative history confirms that Congress intended the federal government to participate as a receiving state. For example, a letter of the Assistant to the Commissioner of the District of Columbia, made a part of the legislative reports, specifically states that the Agreement will enable federal prosecutors to obtain state prisoners for trial. Moreover, a number of references in the reports take on meaning only if the Government participates in the Agreement as a receiving and sending state and, like the Agreement itself, the reports state that the Act is to apply in full to all party states.

The Government's assertion that the history of the writ of habeas corpus *ad prosequendum* and related matters show that the federal government did not abuse detainers and therefore had no need for participation in the Agreement as a "receiving state" is no substitute for analysis of the terms of the Agreement itself. The factual predicate underlying the assertion is also inaccurate. Prior to the adoption of the Agreement, federal detainers lodged against state prisoners actually constituted an enormous percentage of detainers filed. Further, although federal prosecutors often brought prisoners to trial via a writ of habeas corpus *ad prosequendum* prior to completion of their state sentences, it was universally assumed that only as a matter of comity did states honor the writ, and compliance with the writ was not always forthcoming. Because of these uncertainties, and because prior to *Smith v. Hooey*, 393 U.S. 374 (1969), the Sixth Amendment had not always been thought to require an effort to produce the prisoner, recourse to the writ was not always sought. It was to remedy these problems, as well as those which confronted either federal prisoners or state prosecutors, that the Agreement was drafted.

Nor do events subsequent to enactment of the Agreement support the Government's position. The sections of the Speedy Trial Act of 1974 which provide a means by which prisoners may clear detainers not only fail to conflict with the terms of the Agreement on Detainers but were drafted to complement the Agreement. The 1974 report on a bill not yet enacted and newly-proposed amendments, cited by the Government, are irrelevant as evidence of the intent of Congress in 1970 and, in any event, do not support the

position that the Government participates in the Agreement only as a sending state. Finally, since there has been no construction by any agency of the government with respect to the Interstate Agreement on Detainers Act, the Government's position as to the applicability of the statute is entitled to no more weight than the position of any other party.

II. The Government's argument that, notwithstanding the filing of a detainer, its subsequent obtaining of custody of respondent by a writ of habeas corpus *ad prosequendum* did not constitute a request under the Agreement is without basis. As the Government acknowledges, the writ is fully encompassed in the definition of "request for temporary custody" in the Speedy Trial Act, and it further concedes that the same definition in the Agreement may be interpreted as encompassing a writ of habeas corpus *ad prosequendum*. This construction is compelled by the Agreement's plain language and is necessary to effectuate its purposes. Acceptance of a contrary construction would vitiate the Agreement's operation with respect to federal detainers, and thus impair its entire operation.

III. There is also no basis for the Government's argument that respondent waived his speedy trial claim under Article IV(c) of the Agreement. The record demonstrates that respondent frequently claimed his right to a prompt trial and complained that he was being prejudiced as a result of the detainer. Respondent's objections clearly put the court on notice that delay was contested, and his complaints concerning the detainer track the very language of the Agreement. The Government's insistence upon a harsh and inflexible waiver rule is supported by neither the facts

of this case, the language of the Agreement, nor general principles of law.

I.

THE UNITED STATES PARTICIPATES IN THE AGREEMENT ON DETAINERS AS A RECEIVING AND SENDING STATE.

In 1970, Congress passed the Interstate Agreement on Detainers Act (18 U.S.C. App. at 4475-4478). The Act made the federal government a party to the Agreement on Detainers, a compact which was designed to alleviate the host of problems which occurred when one jurisdiction with a pending criminal charge filed a detainer against a prisoner in another jurisdiction, and to provide uniform and efficient procedures for disposition of the charge underlying the detainer. Article I.[4]

Article III of the Agreement provides the means by which a prisoner against whom a detainer has been lodged may secure disposition of the charges against him. Article IV specifies the method by which a prosecutor may secure custody for trial of an individual against whom a detainer has been lodged. Under Article IV(a), the authorities who wish to try a prisoner must submit a written request for temporary custody to the custodian in the jurisdiction where the prisoner is lodged. Under Article IV(c), a prisoner delivered pursuant to that request must be tried within 120 days

[4] The Agreement is set forth as section 2 of the Act.

unless extensions for good cause are granted in open court.

Here, the federal government, a party to the Agreement, lodged a detainer against respondent in Massachusetts, a party state. Pursuant to a request in the form of a federal writ of habeas corpus *ad prosequendum*, respondent was produced for trial. The trial, however, did not take place for another 17 months. The Government does not dispute that this delay violated the speedy trial provision of the Agreement. Rather, it argues that the Agreement was not designed to apply to the federal government when it secures a state prisoner or when a state prisoner seeks disposition of a federal charge.

This argument is made in the face of express language to the contrary in the Interstate Agreement on Detainers Act and in the absence of any support in its legislative history. Moreover, it is an argument which has been rejected by every circuit judge considering it.[5]

A. The Statute Itself.

As this Court has frequently stated, the "starting point in every case involving construction of a statute"

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[5] *United States v. Sorrell*, 562 F.2d 227, 232 n. 7 (3d Cir. 1977) (*en banc*) and *United States v. Thompson*, 562 F.2d 232, 234 (3d Cir. 1977) (*en banc*), 236 (WEIS, J., dissenting), 244 (GARTH, J., dissenting), *petition for cert. filed*, Sup. Ct. No. 77-593; *United States v. Kenaan*, 557 F.2d 912, 915 n. 6 (1st Cir. 1977), *petition for cert. filed*, Sup. Ct. No. 77-206; *United States v. Scallion*, 548 F.2d 1168, 1174 (5th Cir. 1977), *petition for cert. filed*, Sup. Ct. No. 76-6559; *United States v. Mauro*, *supra*.

is the language of the statute itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *United States v. Kahn*, 415 U.S. 143, 151 (1974). Indeed, where sufficiently clear in its context, the language of the statute is the primary determinant of Congressional intent. See, *e.g.*, *Ernst & Ernst v. Hochfelder*, *supra*, 425 U.S. at 201; *United States v. Oregon*, 366 U.S. 643, 648 (1961). Here, in effect, the Government concedes that there is no lack of clarity in the statutory language regarding the Government's role, since "the term 'state' in the Agreement is defined to include the United States and carries no disclaimer that the United States shall participate only as a sending state" (Pet. Br. at 17).

That Congress intended the federal government to be a full participant is the only plausible reading of the statute. Article II(a) of the Agreement provides that:

> 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"Sending State" is then defined as a state in which the prisoner is incarcerated at the time of his or the government's request for disposition [Article II(b)], and "Receiving State" is defined as the jurisdiction in which trial is to be had. Article II(c).

The absence, at the very outset of the Agreement, of any limitation with respect to the statutory language defining the United States as a state demonstrates the contemplation of Congress that the federal government's participation was not to be limited to that of a sending state.

Supplementing the clear language of Article II, Article VIII of the Agreement mandates that "[t]his agreement shall enter into full force and effect as to a party State when such State has enacted the same into law." Again, no limitation appears with respect to the United States.

That Congress intended the United States to be a full participant is also evident from its definition of the term "appropriate court" set forth in Section 4 of the Agreement on Detainers Act:

> The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, *in which indictments, informations or complaints, for which disposition is sought, are pending.* (Emphasis added.)

This term, which is used in Articles III, IV, and V of the Agreement,[6] refers exclusively to a court in a receiving state. Significantly, the Government's brief makes no effort to explain why Congress included a definition stating that federal courts in which indictments are pending – courts of a receiving state – are

[6] Article III(a) requires that the prisoner seeking disposition be tried within 180 days of the delivery of a request for disposition to the prosecuting officer and "appropriate court;" Article IV(b) requires that the state sending the prisoner for trial furnish the "appropriate courts" of the receiving state with notification of the request for custody; and Article V(c), the basis for dismissal in the instant case, provides that where temporary custody is not accepted, or trial is not had in accordance with Article III or IV, "the appropriate court" having jurisdiction of the indictment shall dismiss it with prejudice.

appropriate courts for disposition of such charges under the Agreement. The failure is not surprising, for it is inconceivable, if Congress had intended the federal government's participation to be limited to that of a sending state, that it would have included a definition which applies exclusively to the federal government's participation as a receiving state. The statutory language could not be clearer. The literal terms of the Agreement specify the federal government as a receiving as well as a sending state.

B. The Legislative History.

Contrary to the Government's argument, the legislative history of the Agreement on Detainers Act is fully consonant with its language. While claiming that Congress did not intend to apply the Agreement to the federal government as a receiving state, the Government is able to point only to the fact that a number of references in the brief legislative reports[7] advert to the government's participation as a "sending state" (Pet. Br. at 30-32). But none of those references cited confines federal participation to that capacity. Moreover, the Government has simply ignored statements in the legislative reports which speak to the federal government's participation as a receiving state.

[7] The Agreement was introduced in 1970, adopted by the Congress without opposition, and passed under suspension of the rules. 116 Cong. Rec. 13997-14000, 38840-38842 (1970). See H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. (1970).

For example, the letter of Graham W. Watt, Assistant to the Commissioner of the District of Columbia, included as part of the House and Senate reports, supported federal enactment of the Agreement in part because it would "entitle the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer." H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 4, 7 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 4, 7 (1970). This letter, which was before both Houses of Congress at the time the Act was passed, confirms that Congress was well aware that it was including the federal government as a receiving as well as a sending state.

Furthermore, a number of statements in the reports take on meaning only if Congress assumed that the federal government would participate both as a receiving and sending state. For example, in addressing the right of a prisoner to request disposition of the charges underlying a detainer and the receiving state's obligation to try that prisoner, the reports state:

> For this purpose the prosecutor can obtain temporary custody of the prisoner and take him to the jurisdiction in which trial is to be held. *In the case of a federal prisoner*, the prosecutor will be entitled to temporary custody as provided by the agreement or to the prisoner's presence in Federal custody at the place of trial, whichever arrangement may be approved by the custodian. H.R. Rep. No. 91-1018, *supra* at 2; S. Rep. No. 91-1356, *supra* at 2 (Emphasis added).

This limitation to "federal prisoners" in the second sentence can mean only that the preceding reference to "prisoners" encompasses federal and state prisoners alike. Yet, if the Agreement were intended to restrict the federal government to a sending state, involving only federal prisoners, this paragraph would make no sense.

Finally, as in the Agreement itself, there is specific language in the legislative reports which decrees full participation for all signatories:

> The agreement is open to participation by the United States of America and by the District of Columbia, as well as by each of the several States, the territories and possessions, and the Commonwealth of Puerto Rico.
>
> It is provided that the Agreement shall enter into full force and effect as to a party "State" when such State has enacted the same into law, and that any party may withdraw by enacting a repealer. H.R. Rep. No. 91-1018, *supra* at 3; S. Rep. No. 91-1356, *supra* at 3.

Consequently, not only is there nothing in the legislative history which supports the Government's view of limited federal participation in the Agreement, there is much that contradicts it.

C. The Detainer Problem and the Federal Government.

Unable to find language in the Act itself which states that the federal government was meant to participate only as a sending state, or to find specific evidence in the legislative history to that effect, the Government

embarks upon an historical review of the problems leading to enactment of the Agreement, and more generally of the writ of habeas corpus *ad prosequendum* which, it argues, demonstrates that the Agreement on Detainers was not designed to enable state prisoners to dispose of federal detainers, or federal prosecutors to request the production of state prisoners. Even if the Government's historical analysis were correct, it could not overcome both the clear terms of the statute and the legislative history before Congress. See *United States v. Bass*, 404 U.S. 336, 344 (1971). Moreover, the Government's presentation is less than accurate and furnishes no support for its ultimate conclusions.

The Government takes no issue with Judge Mansfield's exhaustive analysis of the problems which plagued prison administrators, judges, defendants, and prosecutors under the unregulated detainer system in use prior to the Agreement.[8] Nor does the Government

[8] Judge Mansfield's opinion catalogues the many abuses caused by this system. The existence of detainers adversely affected the terms and conditions of a prisoner's confinement, often rendering him ineligible for furloughs, minimum custody, or even parole; the pendency of a detainer hampered prison administrators in developing coherent rehabilitation programs and created difficulties for judges in sentencing; these uncertainties in turn affected the prisoner's ability to rehabilitate himself. A host of different problems were encountered by the inmate when he eventually had to prepare for trial, often far removed from potential witnesses. Despite the severe effects of detainers, virtually any law enforcement officer could file one, and in numerous instances, the only reason the detainer was filed was in an effort to increase the severity of the inmate's sentence. Indeed, it was estimated that as many as 50% of the detainers filed were allowed to lapse upon the prisoner's release. While one of the reasons for this system was the cumbersome nature of the

(continued)

deny that the Agreement on Detainers was designed to provide a comprehensive answer for these problems. Rather, the Government insists that state prisoners with outstanding federal charges did not suffer from the

(footnote continued from preceding page)

extradition process and the lack of uniform rules governing interjurisdictional transfer, another cause was that there was no incentive for prosecutors to attempt to secure custody of the inmate prior to the expiration of his sentence, since as late as the 1960's the rule in the majority of jurisdictions was that an inmate's right to a speedy trial was not violated despite the failure of the prosecution even to attempt to secure custody. See Pet. App. 8a-17a.

In addition to Judge Mansfield's opinion, there are innumerable cases and commentary on the problems posed under the detainer system. See, *e.g.*, *Pitts v. State of North Carolina*, 395 F.2d 182 (4th Cir. 1968); *United States ex rel. Giovengo v. Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961); *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955); *Pellegrini v. Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955); *Barker v. Municipal Court*, 64 Cal.2d 806, 415 P.2d 809, 51 Cal. Rptr. 921 (1966); *People v. Kenyon*, 39 Misc. 2d 876, 242 N.Y.S.2d 156 (Schuyler Co. Ct. 1963); *State v. Milner*, 78 Ohio L. Abs. 285, 149 N.E.2d 189 (Ct. C.P. 1958); *Cane v. Berry*, 356 P.2d 374 (Okla. Crim. App. 1960); Yackle, *Taking Stock of Detainer Statutes*, 8 Loy. U.L. Rev. (LA) 88 (1975); Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767 (1968); Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. Cin. L. Rev. 179 (1966); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417; Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. Chi. L. Rev. 535 (1964); Note, *Convicts – The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828 (1964); Bennett, *The Last Full Ounce*, 23 Fed. Prob. No. 2, at 20 (June 1959). See also the Seminar on the Detainer Problem in 9 Fed. Prob. No. 3, at 1-19 (July-Sept. 1945).

abuses of the detainer system, because the Government "had long been able to obtain state prisoners by writ of *habeas corpus ad prosequendum* . . . because the Sixth Amendment required speedy trial on federal charges," and because it does not appear "that the federal government had traditionally abused the detainer system" (Pet. Br. at 16-17, 12). The historical evidence indicates quite the contrary.

While there are no comprehensive statistics on the number of detainers filed by the federal government, available research indicates that the government filed a large percentage of all detainers outstanding and that the "number of detainers which flow between the federal government and any given state far outnumber those between a given state and any other state." Note, *Convicts – The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828, 856 (1964).

For example, in 1944, in a Michigan prison, federal detainers accounted for 46 out of 109 detainers filed.[9] Between January and June 1962, of 222 out-of-state detainers filed in California, the federal government accounted for 70.[10] In 1963, in a major Illinois prison, of 96 detainers filed, 52 were filed by federal officers.[11] The sheer number of federal detainers – a number totally "disproportionate"[12] to the amount of federal

[9]Heyns, *The Detainer in a State Correctional System*, 9 Fed. Prob. No. 3, at 13, 15 n. 1 (July-Sept. 1945).

[10]Note, *Convicts – The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828, 856 n. 238 (1964).

[11]Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. Chi. L. Rev. 535, 540 (1964).

[12]Comment, 31 U. Chi. L. Rev., *supra* n. 11, at 540.

litigation as compared with the states – was seen as a problem by state officials.[13]

Moreover, prisoners sought by federal authorities were not immune from the abuses of the detainer system. As one state correctional official noted:

> There have been incidents, fortunately rare, where Federal judges or prosecuting attorneys have filed warrants against a committed defendant for the sole purpose of preventing parole consideration in his case. Bates, *The Detained Prisoner and His Adjustment*, 9 Fed. Prob. No. 3, at 16, 17 (July-Sept. 1945).

The degree to which the government abused the system is not nearly as relevant as is the fact that it participated in the system and that there were abuses.

Further, the history of the writ of habeas corpus *ad prosequendum* furnishes little support for the Government's view that prior to adoption of the Agreement it was operating under a fully satisfactory system of obtaining custody of state prisoners and, therefore, that Congress could not have intended to alter the system when it enacted the Agreement.

While the writ has been available since the enactment of the Judiciary Act of 1789 [*Ex Parte Bollman*, 4 Cranch 75 (1807)], and was used to secure custody of federal [*Ponzi v. Fessenden*, 258 U.S. 254, 261 (1922)] and state prisoners, the unchallenged view[14] until quite recently was that, with respect to state prisoners, the writ was only a request and was unenforceable against

[13]See Heyns, 9 Fed. Prob. No. 3, *supra* n. 9, at 14.

[14]This Court specifically reserved the question in *Carbo v. United States*, 364 U.S. 611, 621 n. 20 (1961).

the states. This was premised both on the notion that Congress had never intended the writ to compel production of a lawfully incarcerated state prisoner[15] and upon concepts of comity and exhaustion of jurisdiction articulated in *Ponzi v. Fessenden, supra*, 258 U.S. at 260-261:

> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control,

[15]See Comment, 31 U. Chi. L. Rev., *supra* n. 11, at 541; Yackle, *Taking Stock of Detainer Statutes*, 8 Loy. U.L. Rev. (LA) 88, 96 & n. 56 (1975). This view rested upon the interpretation of the original Judiciary Act in *Ex Parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845), where the Court, holding itself powerless to issue a writ of habeas corpus *ad subjiciendum* against an individual incarcerated in state prison, stated:

> As the law now stands, an individual, who may be indicted in a circuit court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under authority of a State.

As the Court noted in *Carbo v. United States, supra*, 364 U.S. at 615-617, subsequent to the first Judiciary Act, there were several revisions of the habeas corpus statute. However, none of the revisions was intended to alter the writ of habeas corpus *ad prosequendum*. While the writ was for the first time specifically included by name in the 1948 revision of the Judicial Code, that revision was specifically undertaken only "with changes in phraseology necessary to effect the consolidation." Specifically disclaimed was any intent to change the law of habeas corpus. *Id.* at 619. Thus, if the language in *Dorr* and the interpretation of the subsequent history in *Carbo* are correct, Congress has never authorized the writ to run against state prisoners.

> before the other court shall attempt to take it for its purpose.
>
> * * *
>
> ". . . between State courts and those of the United States it is something more . . . a principle of right and law, and therefore, of necessity. . . . These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty." (Citation omitted.)[16]

On the basis of this oft-repeated language, and prior to Judge Mansfield's dissent in *Mauro*, the federal courts adhered universally to the proposition that the production of a state prisoner in federal court via a writ of habeas corpus *ad prosequendum* is accomplished only as a matter of comity between two sovereigns, and that a federal court by issuance of the writ could not compel production of a state prisoner. See, *e.g.*, *McDonald v. Ciccone*, 409 F.2d 28 (8th Cir. 1969);

[16]*Ponzi* involved the question of whether the federal government could "loan" one of its prisoners for trial in a state. While the language in the above case, which held that as a matter of comity the federal government might "loan" its prisoners for trial, was thus uttered in the context of state power to require production of a federal prisoner, the all-embracing language of the opinion was not limited solely to that question and it has not been so limited in cases construing it. See pp. 23-25, *infra*.

United States v. Perez, 398 F.2d 658, 660 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969); *United States ex rel. Moses v. Kipp*, 232 F.2d 147, 150 (7th Cir. 1956); *Gordon v. United States*, 164 F.2d 855, 861 (6th Cir. 1947), *cert. denied*, 333 U.S. 862 (1948); *Stamphill v. Johnson*, 136 F.2d 291 (9th Cir.), *cert. denied*, 320 U.S. 766 (1943); *Lunsford v. Hudspeth*, 126 F.2d 653 (10th Cir. 1942); *Zerbst v. McPike*, 97 F.2d 253 (5th Cir. 1938); *United States ex rel. Brown v. Malcolm*, 350 F. Supp. 496, 499 n. 9 (E.D.N.Y. 1972); *Carlton v. United States*, 304 F. Supp. 818, 822 n. 2 (E.D. Ark. 1969); *Wzesinski v. Amos*, 143 F. Supp. 585, 587 (N.D. Ind. 1956); Annot., 5 L. Ed. 2d 964, 967 (1960). Indeed, consent was not always given. See *United States v. Perez, supra*, 398 F.2d at 660 ("Warden specifically stated that the Arkansas authorities would not comply with such a writ"); *Gordon v. United States, supra*, 164 F.2d at 860 (Ohio warden refuses to produce two co-defendants for trial despite issuance of habeas writ); *Wzesinski v. Amos, supra*, 143 F. Supp. at 587 (federal court unable to issue writ since Indiana legislature "has specifically forbidden the removal of any life convict from any of its prisons for sentence or trial except for treason or first degree murder"); *United States v. Cartano*, 420 F.2d 362, 364 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970) (writ returned unsatisfied when prisoner incarcerated in prison mental hospital).

In the context of this case, the significance of this body of law is not whether its underlying assumptions were correct, but rather that it reflected the universal perception of the issue by courts and prosecutors [see, *e.g., Strand v. Schmittroth*, 251 F.2d 590, 598 (9th

Cir.), *cert. dismissed*, 355 U.S. 886 (1957)] in the period leading up to enactment of the Agreement. The result of this perception is that, prior to the Agreement, the writ of habeas corpus *ad prosequendum* was not the fully satisfactory system of securing custody portrayed by the Government.[17]

The Government's further assertion that, prior to *Smith v. Hooey*, 393 U.S. 374 (1969), state prisoners with federal charges were receiving expeditious trials under the Sixth Amendment ignores the restrictive interpretation of that amendment prevailing at the time. A number of courts held that because a state could refuse to honor a request for custody, the Sixth Amendment did not require an attempt to secure custody. *Nolan v. United States*, 163 F.2d 768 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948); *United States v. Jackson*, 134 F. Supp. 872 (E.D. Ky. 1955). Other courts denied relief to state prisoners under the Sixth Amendment on the ground that it was the prisoner's own fault if he was incarcerated in another jurisdiction. *Morland v. United States*, 193 F.2d 297, 298 (10th Cir. 1951); *United States v. Fouts*, 166 F. Supp. 38, 42 (S.D. Ohio), *aff'd.*, 258 F.2d 402 (6th Cir.), *cert. denied*, 358 U.S. 884 (1958). Consequently, in many instances, federal prosecutors would allow a state sentence to lapse before bringing a prisoner to

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[17] As one commentator concluded, after noting that the federal government could not compel compliance with the writ:

> [D]isposition of the underlying charge must come through the cooperation of the jurisdictions affected. *The Agreement on Detainers is a legislative attempt to achieve just that cooperation.* Yackle, *supra* n. 15, 8 Loy. U.L. Rev. (LA) at 96-97. (Emphasis added.)

trial on federal charges. See, *e.g.*, *United States v. Lebosky*, 413 F.2d 280 (3d Cir. 1969), *cert. denied*, 397 U.S. 952 (1970); *Morland v. United States, supra*, 193 F.2d 297; *United States v. Fouts, supra*, 166 F. Supp. 38; *Wzesinski v. Amos, supra*, 143 F. Supp. 585. While other federal cases in the 1950's and 1960's required the federal government, under the Sixth Amendment, to attempt to secure the defendant prior to expiration of the state sentence [see, *e.g.*, *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956)], the issue was not finally settled until *Smith v. Hooey*. See *United States v. Lebosky, supra*, 413 F.2d at 281-282 ("existing case law as to the government's duty, if any [prior to *Smith*], was far from clear").

Thus, both at the time the Agreement was drafted, as well as when it was passed, the federal government's involvement in the overall detainer problem was similar to that of the states: detainers were often filed and not disposed of easily, while rendition proceedings were fraught with uncertainty.[18]

It is not surprising, therefore, that in 1956, when the Council of State Governments sponsored a conference to review and approve the draft agreement, federal involvement was sought and representatives of the

[18]In fact, the method by which state authorities obtained federal prisoners was little different from the means used by federal prosecutors to obtain state prisoners. In either case, the jurisdiction would issue a writ of habeas corpus *ad prosequendum*, which although normally honored, was honored as a matter of comity. See *Smith v. Hooey, supra*, 393 U.S. at 381 & n. 13.

Department of Justice participated in the meeting.[19] The Agreement which resulted specifically provided for unlimited federal participation as a "state." Indeed, in its commentary on the final draft of the Agreement, the Council confirmed that this participation was meant to be as both a receiving and sending state:[20]

> This proposal, including an appropriate enabling act, carries into effect the right of the prisoner to initiate disposition of detainers based on untried indictments, informations or complaints *arising in other states or from the federal government.* It also provides a method whereby prosecuting officials may initiate such action. Council of State Governments, *Suggested State Legislation Program for 1957* 76 (1956) (Emphasis added).[21]

[19]See Council of State Governments, *Suggested State Legislation Program for 1957* 76 (1956). The first discussions concerning the possible drafting of a model agreement occurred in 1948. In 1955 and 1956 the Joint Committee on Detainers, first convened in 1948, was reconstituted under the auspices of the Council of State Governments. Meetings of the group, composed of members of the Parole and Probation Compact Administrators Associations, National Association of Attorneys General, National Conference of Commissioners on Uniform State Laws, American Prison Association, the Section on Criminal Law of the American Bar Association, the National Probation and Parole Association, and the National Association of County and Prosecuting Attorneys, were held to produce a draft agreement in 1955 and 1956. Following the conference held on April 14, 1956, which the Justice Department attended, the agreement was approved for submission to the states. *Id.*, at 74-76.

[20]The Government concedes that these materials are part of the Agreement's legislative history (Pet. Br. at 30 n. 24).

[21]In fact, federal participation in the Agreement was considered of sufficient magnitude that some state legislators maintained that federal participation in the Agreement itself would render their participation worthwhile. See *1957 New York State Legislative Annual* 42 (1957).

In sum, the history of events leading to Congress' adoption of the Agreement, contrary to the Government's argument, in no way contradicts the specific language of the Agreement, which declares that the federal government is a full party.[22]

Finally, analysis of the terms of the Agreement demonstrates that the problems which the Government claims would be caused by reading the Agreement as written do not exist. The principal Government assertion is that a literal reading of Article IV(a), which provides that after receipt of a request for temporary custody by appropriate state authorities there shall be a 30-day period within which the Governor may disapprove the request for temporary custody, is inconsistent with the mandatory nature of the writ (Pet. Br. at 32-34, 49). The argument misconstrues section IV(a). The drafters' comments make abundantly clear that the section was designed merely to preserve any existing rights to refuse extradition extant prior to the Agreement, not to create any new ones. See *Suggested State Legislation, supra* at 79 ("The possibility [of refusal] is left open merely to accommodate situations involving public policy which occasionally

[22]The Government's argument that federal participation was secured as a result of this Court's decisions in *Smith v. Hooey, supra*, and *Dickey v. Florida*, 398 U.S. 30 (1970), also ignores that in 1968, before *Smith* and *Dickey* were decided, the House of Representatives unanimously passed the Interstate Agreement although the Senate failed to act. See H.R. Rep. No. 91-1018, *supra* at 1.

have been found in the history of extradition.").[23] Thus, as the court below noted, even if the writ is mandatory, there is no conflict between Article IV, properly read, and the writ (Pet. App. 19a-20a).

In any event, even if Article IV(a) is construed in the hypertechnical fashion suggested by the Government, it would be unreasonable to take the "hypothetical and possibly non-existent conflict" resulting thereby between Article IV(a) and the writ, "and use it as the touchstone for an interpretation that would vitiate its operation insofar as it affects federal detainers" (Pet. App. 20a). The court of appeals' conclusion that Article IV(a) be construed in light of the overall language and purposes of the Agreement is firmly based. See *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631-632 (1973).[24]

[23]In preserving existing rights, Article IV(a) is similar to the transfer provision of the Speedy Trial Act [18 U.S.C. §3161(j)(4)], whose applicability the Government concedes. That provision specifies that upon receipt of a request for temporary custody, the prisoner shall be turned over to the Government "subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery."

[24]The Government also argues that the "no return" provision of Article IV(e) would frustrate a prisoner's rehabilitation by forcing him to remain in a federal facility rather than permitting his return to a nearby state facility (Pet. Br. at 34). The simple answer is that the prisoner is free to waive the protection of this section, precisely what the court of appeals found to have occurred here. Finally, the Government's argument that Article IV(e) [or IV(c)] mandates that when the United States requests temporary custody on a single charge, all prosecutions in the United States must be undertaken before the prisoner is returned to the sending jurisdiction (Pet. Br. at 33) misreads the Agreement. There is no such command in Article IV.

D. The Speedy Trial Act and "Subsequent Administrative Interpretation."

The Government also argues that subsequent actions by Congress – particularly passage of the Speedy Trial Act of 1974 – demonstrate Congress' understanding that the Government's participation in the Agreement was limited. While this claim is again a poor substitute for analysis of the explicit terms of the Agreement [see *United States v. Bass, supra*, 404 U.S. at 344], the materials relied on by the Government, in fact, are consistent with full federal participation.

1. On January 3, 1975, the Speedy Trial Act was enacted into law.[25] 18 U.S.C. (Supp. V) §3161 *et seq.* In addition to detailed time limits, exclusions and sanctions involving the commencement of federal trials, the Act includes a brief section dealing with the transfer of a prisoner charged with a federal offense serving a "term of imprisonment in any penal institution." 18 U.S.C. §3161(j). The Act requires that the Government Attorney who has filed a charge either produce the prisoner for trial or lodge a detainer. Where a detainer is lodged, the prisoner must be informed of the charge and, if he requests trial, the request must be

[25]The form of the bill, as first passed by the Senate after some three years of hearings and debate, contained time limits for commencing federal criminal trials but no language governing the interjurisdictional transfer of a prisoner. See S. Rep. No. 93-1021, 93rd Cong., 2d Sess. 25-28 (1974). Only following Senate passage of the bill, and House Subcommittee hearings, was a section dealing with the transfer of a prisoner charged with a federal offense added. H.R. Rep. No. 93-1508, 93rd Cong., 2d Sess. 34-36 (1974).

forwarded to the government. When such request is received by the United States Attorney, he must, in turn, deliver to the custodian a "properly supported request for temporary custody." 18 U.S.C. §3161(j)(4).

The Government's argument is that these provisions are redundant with the Agreement on Detainers and demonstrate that the Agreement does not apply to the federal government (Pet. Br. at 37-41). Analysis of the source of the transfer provisions demonstrates that the argument is without basis.

As the legislative history of the Speedy Trial Act explicitly declares, the Act's transfer provisions were adopted almost verbatim from section 3.1 of the ABA's Standards Relating to Speedy Trial [ABA Project on Standards for Criminal Justice (Approved Draft, 1968)]. H.R. Rep. No. 93-1508, 93rd Cong., 2d Sess. 34 (1974).[26] The Commentary to the ABA Standards specifically refers to the Interstate Agreement on Detainers and finds in it a means for implementing the Standards.

For example, Section 3161(j)(4) of the Act provides that upon receipt of a demand for temporary custody, the prisoner shall be made available to the prosecuting authority. This section is identical to Section 3.1(d) of the Standards which is explained in the Commentary in the following way:

> This subsection merely states the general responsibility of the incarcerating authorities to make the prisoner available upon proper demand.

[26]The ABA Standards and Commentary are set forth as an appendix to the House Subcommittee Hearings. *The Speedy Trial Act of 1974: Hearings Before Subcomm. on Crime of the House Comm. on Judiciary*, 93rd Cong., 2d Sess. 499, 542-550 (1974).

> See Article V(a) of the Interstate Agreement . . .. No attempt is made in the standard to spell out all of the details on transfer of and responsibility for custody in cases where more than one jurisdiction is involved. *They are set out in detail in Article V of the Interstate Agreement.* ABA Standards, *supra* at 38. (Emphasis added.)

In similar fashion, the ABA Standard requiring the custodian to notify the Government Attorney of a prisoner's demand for trial [§3.1(b), enacted as §3161(j)(2)] and the Standard requiring the prosecutor to attempt to obtain custody of the prisoner [3.1(c), enacted as §3161(j)(3)] both explicitly state that the procedures outlined in the Interstate Agreement on Detainers are appropriate means of carrying out the general language of the Standards.[27] The only section of the Standards which does not rely on the Agreement, §3.1(a), enacted as §3161(j)(1) of the Act, requiring the prosecutor to lodge a detainer or produce a prisoner, was designed to remedy a defect perceived in the Agreement on Detainers: that an inmate with a pending charge not reflected by a detainer had no right under the Agreement to force disposition of the charge. See ABA Standards, *supra* at 34. In no sense can this provision be deemed to conflict with the Agreement. Consequently, the materials before Congress when the Speedy Trial Act was passed in fact demonstrate that

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[27]ABA Standards, *supra* at 35 ("No attempt is made in the standard to set forth a precise procedure as to how this is to be done, although the specific procedures set forth in the Uniform Act and the Interstate Agreement would appear appropriate."), 36 ("[I]f the incarcerating state is also a party to the Interstate Agreement, a written request in compliance with Article IV(a) of the Agreement would be in order.").

the custody procedures adopted by the Congress were fully compatible with the Agreement on Detainers.[28]

The Government's argument is also not strengthened by variations between the time limits or conditions in the Speedy Trial Act – the sanctions of which will not even become effective until 1979 – and those in the Interstate Agreement on Detainers. The variances are attributable to the differences in purposes between the two statutes.

The conditions of the Interstate Agreement on Detainers such as the transfer-back provision [Articles III(d) and IV(e)] apply to a particular class of cases in those jurisdictions which have enacted an Agreement which is concerned with the effect of detainers on prisoners' rehabilitation as well as with the necessity of providing a speedy trial. If Congress sets different time limits – either more or less stringent – for federal trials, that action does not constitute a repeal of the Agreement any more than the enactment of state speedy trial rules not identical with the Agreement can be viewed to have repealed that state's participation.

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[28]Moreover, although the House Legislative Report on the Speedy Trial Act – the only source discussing the Act's custody provision – has no explicit reference to federal participation in the Agreement on Detainers as either a sending or receiving state, it recognizes the existence of compacts such as the Agreement and reaffirms adherence to existing law in that regard:

> In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, *the Committee does not intend in any way to change existing law with respect to extradition or transfer of and responsibility for custody in cases where more than one jurisdiction is involved.* H.R. Rep. No. 93-1508, *supra* n. 25, at 36 (Emphasis added).

Finally, even if the Acts are regarded as partially redundant – a proposition we dispute – that alone would not be sufficient to override the express language of the Agreement on Detainers Act. As this Count noted in *United States v. Bass, supra*, 404 U.S. at 344:

> While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional law-making.

2. The two other examples cited by the Government as evidence of Congress' belief in the limited government role under the Agreement (see Pet. Br. at 41-42) require only brief response. First, that there are currently pending amendments which, if enacted, will provide for federal participation in the Agreement as a sending state for purposes of Articles III and IV, but as a receiving state only as to Article III, is more an admission that there is at present no qualification on the government's participation in the Agreement than it is evidence that federal participation is limited. Nonetheless, these amendments do not adopt the construction of the Agreement urged by the Government, since they recognize that at least for purposes of Article III, the federal government participates both as a sending and receiving state. See S. 1437, 95th Cong., 1st Sess., Section 3201 (1977); H.R. 6869, 95th Cong., 1st Sess., Section 3201 (1977).

Equally irrelevant is the Government's citation to a draft of a Senate Judiciary Committee Report on S.1, 94th Cong., 1st Sess. (1975), a bill never passed, which expressed an opinion that a previous Congress, in enacting the Agreement on Detainers, had not intended

to limit the writ of habeas corpus *ad prosequendum*. Even assuming that affirmance of the court below would limit the writ, a position we dispute (see pp. 28-29, *supra*), the report is entitled to no weight, for it is well established that the opinions of members of Congress expressed subsequent to passage of a statute cannot alter the intent of the Congress which enacted it. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); see *United States v. S.W. Cable Co.*, 392 U.S. 157, 170 (1968); *United States v. Wise*, 370 U.S. 405, 411 (1962).

3. The Government's argument that, as an agency charged with administration of the statute, its own interpretation of the Act is entitled to "considerable weight" (Pet. Br. at 36) is also without merit.

First, there has been no expressly articulated construction by any agency of the federal government with respect to this legislation. The Government's argument that its failure to act is equivalent to the adoption of a definitive construction has been rejected time and again by this Court. *E.g., Baltimore & O.R.R. v. Jackson*, 353 U.S. 325, 330-331 (1957); *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 590 (1957); *Investment Co. Institute v. Camp*, 401 U.S. 617, 627 (1971). Nor are the present rationalizations of the Solicitor General the equivalent of an agency construction. *Investment Co. Institute v. Camp, supra*, 401 U.S. at 628.

Second, it is not at all clear that the government "enforces" or "administers" Article IV of the Agreement. The sanctions for violation of Article IV of the Agreement are enforced by the courts, not the Justice Department, and while the Department may

make use of a request for temporary custody it no more "administers" such a request under Article IV than it administers the writ of habeas corpus *ad prosequendum.*[29] But even if the Government administers the statute, and its position is the equivalent of an agency construction, that position is still of no consequence unless this Court also finds it consistent with the language of the statute and with the Congressional purpose in enacting it. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). And, since the Government's argument is completely inconsistent with both the language and purpose of the Agreement, it is entitled to no weight.

In sum, analysis of the terms of the Agreement on Detainers Act, its legislative history, and events leading up to its passage, overwhelmingly sustains the court of appeals' conclusion that Congress intended the federal government to participate both as a sending and receiving state. While the Justice Department may be discontent with the language of the statute, its relief must come from Congress, not this Court.

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[29]The cases cited by the Government are inapposite. As an example, *Perkins v. Matthews*, 400 U.S. 379 (1971), involved the Voting Rights Act, enforcement of which was specifically entrusted to the Attorney General by the requirement of submission of plans for his approval. Similarly, *Johnson v. Robison*, 415 U.S. 361 (1974), involved an express opinion by the Board of Veteran's Appeals concerning its jurisdiction to decide constitutional questions under the Veteran's Act. Here, the Government has no enforcement power similar to that which it has under the Voting Rights Act, nor does it have the kind of adjudicative role as in *Johnson*.

II.

WHERE THE GOVERNMENT HAS ACTUALLY FILED A DETAINER, A WRIT OF HABEAS CORPUS *AD PROSEQUENDUM* SUBSEQUENTLY ISSUED FOR PRODUCTION OF A STATE PRISONER CONSTITUTES A REQUEST FOR TEMPORARY CUSTODY UNDER ARTICLE IV OF THE AGREEMENT ON DETAINERS.

The Government argues that despite its lodging of a detainer against respondent, its subsequent request for custody did not constitute a request under the Agreement on Detainers because the Government chose to denote the means of securing custody a writ of habeas corpus *ad prosequendum.* The court below properly rejected this argument for not only does it contravene the language of the statute, but to credit it, as Judge Mansfield observed, would "stand the Act on its head" (Pet. App. 19a).

Article IV of the Agreement provides that an officer of the jurisdiction in which a charge is pending shall be entitled to have a prisoner "against whom he has lodged a detainer" made available upon presentation of a "written request for temporary custody." Article IV(a). Here, the Government actually lodged a detainer against respondent, and produced him for custody from Massachusetts via a request denoted a writ of habeas corpus *ad prosequendum.* Despite the Government's concession that the term "request" may be interpreted as including a habeas writ, it argues that it should not be so construed because "the terms of the statute and its legislative history compel the opposite result" (Pet. Br. at 48).

Nothing in the statute warrants such an assertion. While the Government again argues that the term "request" is inconsistent with the mandatory language of a writ, it ignores both that when the Agreement was enacted the writ was interpreted with respect to the states as no more than a request, and that, as the court below found, Article IV(a) was not designed to diminish whatever power to compel production is inherent in the writ (Pet. App. 19a-23a).

Moreover, adoption of the Government's argument would lead to the anomaly that the same term "request for temporary custody" in the Speedy Trial Act, which the Government concedes includes a writ of habeas corpus *ad prosequendum* (Pet. Br. at 48 n. 35), means something entirely different when used in the Interstate Agreement. Yet the Government offers no justification for this reading but to say that the provisions of the Speedy Trial Act, unlike the Agreement, were designed "to have broad applicability." (*Id.*) Such a distinction is completely unfounded. The materials before Congress at the time the Agreement was passed and the language of the Agreement demonstrate that it was designed to apply with "full force and effect." Moreover, the interrelationship between the Speedy Trial Act and the Agreement is clearly evinced by the Commentary to the ABA Standards upon which the transfer provisions of the Speedy Trial Act are based.[30]

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[30]The Commentary specifically refers to a "request" under the Agreement as a proper means for requesting custody under the ABA Standards in interjurisdictional transfers, and also notes that the Interstate Agreement provides the detail for transfer and custody provisions in those cases involving more than one jurisdiction (see pp. 31-33, *supra*).

Apart from the Speedy Trial Act, even a brief analysis of the purposes of the Agreement compels the conclusion that where the government files a detainer, its subsequent obtaining of the prisoner is by a request under the Agreement. As previously discussed (pp. 13-30, *supra*) the Agreement was designed, for federal and state prisoners alike, to provide uniform procedures to alleviate the multiplicity of problems posed by the effect of detainers upon prisoners, parole authorities, prosecutors, and judges.

"[T]o encourage the expeditious and orderly disposition" of charges underlying detainers (Art. I), the drafters included two complementary procedures. Under Article III, the prisoner may demand disposition of the charges. Under Article IV, the prosecutor initiates disposition of the charges. In either situation, the Agreement requires that trial be expeditiously concluded. As the court below noted:

> In part the limitations imposed by Article IV constitute necessary corollaries to those imposed by Article III, since without Article IV limitations prosecutors would be able to avoid the limitations under Article III merely by arraigning the prisoner without any intention of granting a prompt trial, thereby circumventing the requirements of the Agreement." (Pet. App. 18a)

This case exemplifies the wisdom of Judge Mansfield's conclusion and the correct application of the statute. The detainer lodged against respondent was unresolved for almost two years. Despite persistent requests for a prompt trial, almost 18 months passed between arraignment and trial. That respondent was denied certain rehabilitative benefits was never contradicted by the Government. And the delay, in fact,

deprived respondent of the opportunity to serve a greater portion of his federal sentence concurrently with his state sentence.

To treat the writ other than as a temporary request for custody would permit the Government, after burdening a defendant with a detainer, to circumvent the minimal requirements of the Agreement by the designation on its custody request. Such an interpretation would, as the court below found, "vitiate its [the Agreement's] operation insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would substantially impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (Pet. App. 20a). Moreover, it would run expressly counter to the guidelines set forth in Article IX that the Agreement be construed liberally to effectuate its purposes.

The Government's argument is also premised on a misreading of the opinion below. The court did not hold, as the Government suggests, that "Congress intended to condition further use of the writ upon compliance with Article IV of the Interstate Agreement on Detainers" (Pet. Br. at 47), nor does the court's reasoning warrant a conclusion that Congress has repealed the writ. Rather, Judge Mansfield's opinion applies the Agreement only in those cases where the government in fact lodges a detainer, thereby triggering the very problems the Agreement was designed to eliminate. Whether, in the absence of a detainer, the Agreement applies, whether in such a case the writ may be used without reference to the Agreement, or whether the writ itself constitutes a detainer, making

the Agreement the exclusive means of producing a prisoner, are questions presented not by this case but by *United States v. Mauro*, where no detainer was filed. The substantial difference between the two cases is attested to by the fact that Judge Mansfield, who wrote the opinion below, dissented in *Mauro*, and that courts which reject *Mauro* have consistently maintained that where the government files a detainer, it is bound by the Agreement. *United States v. Kenaan, supra*, 557 F.2d at 915 n. 6 ("Were we required to decide the question, we would, on this record, conclude that the United States participates as both a sending and a receiving State and that when it lodges a detainer, as it did in *Cyphers, Ford*, and *Sorrell*, . . . the United States must comply with the Agreement."); *United States v. Scallion, supra*, 548 F.2d at 1174;[31] see also *United States v. Ricketson*, 498 F.2d 367 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974).

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[31]The Government points to language in the legislative history, cited by the court in *Scallion, supra*, 548 F.2d at 1171, to the effect that Article IV is "a" means whereby prosecutors may obtain the presence of a prisoner serving a term of imprisonment as evidence that other means – a habeas writ, for example – were not precluded. Even if this phrase is given the meaning now sought by the Government, it does not support the position that a habeas writ is never a request under the Agreement. Indeed, if *United States v. Scallion* and *United States v. Kenaan* are correct, a writ of habeas corpus *ad prosequendum* may be used without reference to the Agreement where no previous detainer has been filed by the government. This result is consistent with the determination of the court below and with *United States v. Sorrell, supra*, where detainers were filed, and with the language of the legislative report that the Agreement is "a" means to secure custody where the government has untried charges.

III.

THE COURT BELOW PROPERLY FOUND THAT ON THE FACTS OF THIS CASE RESPONDENT DID NOT WAIVE HIS CLAIM UNDER ARTICLE IV(C) OF THE AGREEMENT ON DETAINERS.

Despite respondent's repeated protestations over the delay in his trial and his specific allegations that the detainer was causing him irreparable prejudice, the Government claims that his failure to invoke specifically the Agreement on Detainers constitutes a waiver. This argument, unsupported by the facts of this case, the language of the statute, or general principles of law, was correctly repudiated below.

From the very outset of this case, the record attests to respondent's effort to secure a prompt trial and to eliminate the prejudice caused by the pendency of the federal detainer. Almost immediately after he was arrested, and before he was represented by counsel, he wrote to the United States Attorney requesting a trial as soon as possible. In May, 1974, he objected to the first 90-day continuance sought by the Government and, through counsel, alleged that the federal detainer was rendering him ineligible for certain rehabilitative programs. Although not permitted to be present when the case was reassigned and postponed, he communicated his objection to the delay. Following the Government's motion in November, 1974, for yet another adjournment, he moved to dismiss the indictment, again alleging he was prejudiced by denial of furlough opportunities caused by the detainer. When on February 18, 1975, yet another continuance was

granted, counsel repeated his objection. Although not consulted or allowed to be present when the final three-month delay was ordered by the court, respondent once again pressed his objection and moved to dismiss (A. 64, 84-90, 93-94, 102, 105).

By these persistent objections, the court was clearly on notice that any delay was against respondent's wishes. Respondent's specific reference to the prejudice caused by the detainer not only placed clearly before the court the substance of the Agreement's concerns, it tracked the very language of Article I of the Agreement.

The Government's argument is thus reduced to an assertion that, irrespective of any of the underlying facts of the case, the failure specifically to incant Article IV of the Agreement on Detainers is an irrevocable waiver of the claim. Yet there is no language in the Act to support such a rule. While a demand for disposition must be made under Article III to invoke its benefits, there is no provision in Article IV or V requiring a motion which specifically denotes the Agreement as an invariable prerequisite to relief. Compare Speedy Trial Act of 1974, 18 U.S.C. §3162(a)(2). Rather, the Agreement commands that in the event it is violated, the court "shall enter an order" dismissing the indictment with prejudice. Article V(c). Congress' failure to include such a provision is persuasive evidence that no such automatic bar was intended. The Government's contention that this failure is insignificant since Congress enacted the Agreement "without any evident awareness that it might apply to the United States as a receiving state" (Pet. Br. at 57 n. 40) is unconvincing, since the materials before Congress

demonstrate that it was fully aware of the federal government's participation in the Agreement as a receiving state. See pp. 12-17, *supra.*[32]

Similarly unpersuasive is the Government's Rule 12 argument. Rule 12, Fed. R. Crim. P., requires assertion before trial of a number of defenses and provides that any not raised will be waived. As the Government concedes, a motion for a speedy trial under a statute such as the Agreement is not included as a claim which must be raised before trial. While Rule 12 also provides that any defense, objection or request capable of determination without trial *may* be raised by motion, there is no waiver specified for failure to make these non-mandatory motions. Furthermore, it is not at all clear that even this section of Rule 12 applies to respondent's claim, since, as Professor Moore has suggested "[m]otions raising defensive matter cognizable under Rule 48(b) (dismissal for lack of speedy trial or for failure to prosecute) would still appear to operate independently of Rule 12." 8 J. Moore, *Moore's Federal Practice,* ¶12.02[1] at 12-13 (1977 Rev.). Accord, *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir. 1977), *petition for cert. filed sub nom. United States v. Ferro*, Sup. Ct. No. 77-326.

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[32]The decision of the court is also consistent with Article IX of the Agreement which states that it "shall be liberally construed so as to effectuate its purposes." Given the very real prejudice respondent has suffered as a result of the delays, to find a waiver would denigrate the purposes of the Agreement. See *United States v. Cyphers*, 556 F.2d 630, 635 (2d Cir. 1977), *petition for cert. filed sub nom. United States v. Ferro*, Sup. Ct. No. 77-326.

The record in this case, the terms of the Agreement, and the lack of any persuasive authority to the contrary cited by the Government compel affirmance of the decision of the court below.

CONCLUSION

For the above-stated reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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